Burnup & Sims, Inc. *and* **Cable Splicers Union of California.** Case 31-CA-9212

June 30, 1981

DECISION AND ORDER

On November 25, 1980, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in opposition to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.

1. The Administrative Law Judge found that Homer McDowell was a supervisor within the meaning of the National Labor Relations Act, as amended, and Respondent was bound by its supervisor's grant of permission to the crew members to be absent from work on July 18, 1979,[2] for the purpose of engaging in protected concerted activity. Respondent excepted to this finding, contending that it is not bound by the acts of McDowell because McDowell lacked authority to grant the entire crew a day off.

We agree with the Administrative Law Judge's determination that McDowell was a supervisor within the meaning of the Act. We also agree with his finding, for the reasons set forth by him, that Respondent was bound by McDowell's action in granting the entire crew a day off. With respect to the latter finding, however, we additionally rely on the fact that the employees could reasonably believe that McDowell was acting for and on behalf of management in the situation in dispute in this regard, it was uncontroverted that McDowell was the management representative empowered to grant days off. Thus, the employees were justified in believing that McDowell had the authority to grant their requests. Therefore, in light of the fact that McDowell was a supervisor within the meaning of the Act and the employees were justified in relying on his authority to grant time off, Respondent is bound by McDowell's grant of permission to the crew members to be absent from work on July 18 for the purpose of engaging in protected concerted activities.

Respondent further contends that, in spite of the fact the employees had permission to be absent from work to engage in protected concerted activities, their discharge was lawful because the discharge was based on the fact that the employees did not report to work and was not based on the fact that the employees were engaging in protected concerted activities. We disagree.

We recognize that an employer has a legitimate interest in having its employees report to work in the manner prescribed by the employer so that production is not interrupted. Discharging an employee for failing to report to work becomes unlawful, where, as in the instant case, the employer has given the employees permission to be absent from work for the purpose of engaging in protected concerted activities, because the protected concerted activities are inextricably intertwined with the employees' absence from work. *Wheeling-Pittsburg Steel Corporation*, 241 NLRB 1214 (1979). Stated otherwise, by giving the employees permission to be absent from work to engage in protected concerted activities and then acknowledging that the employees were discharged for failure to report to work, Respondent has acknowledged that the employees were discharged for engaging in protected concerted activities. Thus, to allow an employer to discharge employees for failing to report to work after the employer gave the employees permission to be absent from work would be contrary to the purposes of the Act as it would restrain and coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. *Supreme Optical Company, Inc.*, 235 NLRB 1432 (1978), enfd. 628 F.2d 1262 (6th Cir. 1980).

2. Therefore, in agreement with the Administrative Law Judge, we find that Respondent's discharge of its cable splicing crewmembers, under the circumstances set forth above, violated Section 8(a)(1) of the Act.[3]

Respondent also excepted to the Administrative Law Judge's finding the the letter Respondent mailed to employee Higgins did not constitute a good-faith effort to communicate a valid offer of reinstatement sufficient to toll Respondent's backpay liability. Respondent contends that its reinstatement offer was made in good faith as the letter was mailed to the only address Higgins ever provided

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates herein are 1979 unless otherwise indicated.

[3] Thus, in light of the above, Respondent's motive for discharging the individuals in question is not material. The fact that Respondent granted permission to the employees to be absent from work so they could engage in protected concerted activities is determinative. Therefore, as this is not a case turning on employer motivation, our decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is not applicable in the instant case.

Respondent. We agree. The address to which Respondent's offer of reinstatement was sent was obtained from Higgins' employment application, contained on Higgins' tax withholding form, printed on the paycheck Higgins received from Respondent every week, and used approximately 2 months earlier by Respondent on a registered letter which Higgins did receive.[4] Furthermore, Higgins testified that his mail carrier knew him and would probably put a letter for him in the right box.[5]

Additionally, there was no showing that alternative means for communicating with Higgins were available to Respondent. Thus, on his employment application, Higgins listed that he had no telephone. Furthermore, unlike the Administrative Law Judge, we will not presume that Higgins was listed in the local telephone directory.

Under these circumstances, we find that Respondent has made a good-faith effort to communicate a valid offer of reinstatement to Higgins. Therefore, while Respondent's good-faith effort to communicate a valid offer of reinstatement to Higgins does not relieve Respondent of the obligation to reinstate Higgins, it does toll Respondent's backpay liability as of September 19, the date of the offer of reinstatement. *Rental Uniform Service*, 167 NLRB 190 (1967).[6]

3. We also find merit in Respondent's exception to the breadth of the Administrative Law Judge's recommended Order directing Respondent to mail the attached notice to each of its employees working for General Telephone Corporation in Southern California. The policies and objectives of the Act will be adequately served by directing Respondent to post the notices as directed by the Administrative Law Judge and to mail such notices to the homes of the employees who were employed as of the date of the discharges and/or are presently on Respondent's cable splicing crew in Santa Monica, California,[7] the only location affected by Respondent's unlawful conduct. We shall accordingly modify the recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Burnup & Sims, Inc., Upland, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(c):

"(c) Post at its Upland, California, office copies of the attached notice marked 'Appendix.'[32] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. In addition, and inasmuch as it does not appear that Respondent's cable splicers ever visit the Upland, California, office on any regular basis, Respondent is also ordered to mail to each of its cable splicers who were employed as of the date of Respondent's unlawful discharges herein and/or who presently work for GTC on its Santa Monica, California, crew a copy of the aforementioned notice."

2. Substitute the attached notice for that of the Administrative Law Judge.

[4] The Administrative Law Judge found that the fact that this letter was returned to Respondent with the typed street address corrected from "6060" to "6150" should have put Respondent on notice that Higgins' address as contained in its records was possibly erroneous. It must be noted, however, that the Administrative Law Judge also found that even a *cursory* examination of the envelope would have revealed that the letter had not been returned because of an incorrect address, but had been "refused" by Higgins himself. In light of this latter finding, we are at a loss to determine why the future use of the address for Higgins contained in Respondent's file would not have been in good faith.

[5] This case is clearly distinguishable from *Marlene Industries Corporation, et al.*, 234 NLRB 285 (1978), relied on by the Administrative Law Judge, where we found that the employer's offer of reinstatement was not made in good faith because the employer's letter containing the reinstatement offer was mailed to an address which the employer knew was both an incorrect address and would result in the letter being returned marked "addressee unknown."

Here, Respondent used the address supplied by Higgins. As noted above, a previous letter so addressed had reached Higgins. Under these circumstances, where Respondent was not on notice that Higgins was unlikely to receive its offer, Respondent's failure to verify Higgins' address does not establish a lack of good faith.

[6] In adopting the Administrative Law Judge's other findings concerning alleged offers of reinstatement, we place no reliance on his comment that it is conceivable that Respondent's offers of reinstatement were made in order to limit its potential monetary liability or to establish a defense to the instant charges. So long as an offer of reinstatement is valid, the fact that the offer is extended to limit backpay liability is irrelevant.

[7] In agreement with the Administrative Law Judge, Chairman Fanning would find that the breadth of the notice provision contained in the Administrative Law Judge's Order was proper and appropriate. See, e.g., *Daniel Construction Company, Inc.*, 239 NLRB 1335 (1979).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise interfere with, restrain, or coerce our employees as a result of their having consulted with agents

of the National Labor Relations Board or the Equal Employment Opportunity Commission or engaged in any other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to employees Gregory Mark Higgins, Travis Lee Horton, and Rodney Brothers immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make each whole for any loss of benefits suffered by reason of his discharge, with interest.

WE WILL make Lawrence Robert Kiggins, Hui Jon Kim, Rhonda Carol McDowell, David Lawrence Hammers, and Jess Flores whole for any loss of benefits suffered by reason of his or her discharge, with interest.

BURNUP & SIMS, INC.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: This proceeding was heard before me on February 20 and 21, March 11, and April 4, 1980, in Los Angeles, California. On September 8, 1979, the Regional Director for Region 31 of the National Labor Relations Board, herein called the Board, issued a complaint, pursuant to an original and a first amended charge filed by Cable Splicers Union of California on July 19 and September 26, 1979, respectively.[1] The complaint alleges, in substance, that Burnup & Sims, Inc., herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by discharging employees Gregory Mark Higgins, Rhonda Carol McDowell, David Lawrence Hammers, Lawrence Robert Kiggins, Travis Lee Horton, Hui Jon Kim, Rodney Brothers, and Jess Flores because they consulted with the Board and certain labor organizations concerning work problems and for other mutual aid and protection. Respondent filed an answer denying the commission of any unfair labor practices. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Extensive briefs were filed by counsel for the General Counsel and by Respondent, and said briefs have been carefully considered. Based upon my examination of the entire record in this case, upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

[1] Unless otherwise stated, all dates herein are in 1979

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Florida corporation, maintains an office and place of business located in Upland, California, and is engaged in cable splicing work within the State of California. Respondent, in the normal course and conduct of its business operations, annually derives gross revenues in excess of $500,000 and annually performs services, valued in excess of $50,000, for customers within the State of California, which customers meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. Respondent admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. ISSUES

1. Whether Respondent violated Section 8(a)(1) of the Act by discharging employees Gregory Mark Higgins, Rhonda Carol McDowell, David Lawrence Hammers, Lawrence Robert Kiggins, Travis Lee Horton, Hiu Jon Kim, Rodney Brothers, and Jess Flores on July 19, 1980, because they "consulted with" the National Labor Relations Board or engaged in other protected concerted activities.

2. If said individuals were discharged in violation of Section 8(a)(1) of the Act, did Respondent make valid offers of reinstatement to them so as to toll its backpay liability and obviate the necessity for a reinstatement remedy.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

General Telephone of California, herein called GTC, is a wholly owned subsidiary of General Telephone and Electronics Corporation and provides telephone services for various geographical and municipal areas in California, including portions of Los Angeles, Ventura, Orange, Riverside, and San Bernardino Counties. In connection with its cable laying and cable splicing operations in these areas, GTC employs not only its own workers but also subcontracts out these operations to various contractors. Among these latter contractors are Volt Technical Corporation, Carrier Communications, CID Communications, Tessine, and Respondent. The record establishes that all of Respondent's cable laying and cable splicing work in California is performed for GTC upon such a subcontracting basis. The record further establishes that Respondent has two types of requirements contracts with GTC—a "singles" contract and a "crews" contract. Under the former arrangement, Respondent provides an employee to GTC to work at a site predetermined by GTC. While remaining a full-time employee of Respondent, which pays his wages and any fringe benefits and which deducts any withholding taxes, the individual is directly supervised by GTC supervisors; the latter assigns and directs his work; and GTC provides any necessary equipment including a truck and tools. Pursuant to the crews contract, Respondent commits itself to a set-

pricing scale for a 1-year period. Within this time frame, when GTC needs cable splicers, it contacts Respondent—as well as the other subcontractors who have similar contracts—and requests that a specific number of men be sent to a predetermined location. Respondent is then asked for a commitment date, and GTC compares this date with those of Respondent's competitors. The contractor with the earliest commitment date is awarded the work. Normally, there is no specific duration for the work, and crews are subject to location changes on a 1-week notice basis.[2] Under this type of arrangement, Respondent provides the necessary work force, a crew foreman, trucks, and all equipment for the job. The crew is supervised by the foreman who is responsible for directing the work of the crew. In July, Respondent had approximately 65 to 70 singles working for GTC and approximately 65 to 70 individuals assigned to cable splicing crews for GTC throughout the southern California area.

At all times material herein, Respondent had a cable splicing crew working for GTC out of the latter's Santa Monica, California, facility, which is the headquarters point for an area extending north to the Ventura County line and east to Lancaster. Volt Technical Corporation and CID Communications also had cable splicing crews at this location. As of May 31, the Santa Monica crew foreman for Respondent was Homer (Buddy) McDowell,[3] and the crew consisted of 10 individuals—Gregory Mark Higgins, Rhonda Carol McDowell,[4] David Lawrence Hammers, Lawrence Robert Kiggins, Travis Lee Horton, Hui Jon Kim, Rodney Brothers, Jess Flores, and two apprentice cable splicers. On May 31, Joseph Powers, Respondent's then California division manager, had lunch with Arnold Winters, GTC's plant construction superintendent for the Santa Monica division, and Ken Hart, GTC's construction coordinator in Santa Monica. Acoording to Powers, "At that time, Mr. Winters indicated . . . that they were in the process of evaluating the performance of all contractors in that yard. . . . that the overall performance of the three foremen on the splicing crews was about equal; however, the performance of our splicers was not. . . . our splicers were at the bottom."[5]

At 2 o'clock that afternoon, Powers spoke to Homer McDowell in the Santa Monica yard and informed McDowell that GTC was in the process of evaluating the performance of all the Santa Monica contract cable splicers, that some of Respondent's employees were at the bottom of the list, and that they had to change that situation. Powers told McDowell that Respondent "couldn't afford to maintain people that were listed at the bottom." McDowell expressed displeasure that his crew was not getting sufficient overtime while other crews were working overtime hours. Powers promised to check into the situation but indicated the answer probably was related to the crew's performance. McDowell, who testified on behalf of the General Counsel, did not deny either the occurrence of or the substance of this conversation.

Powers further testified that he again spoke to Winters and Hart on June 29 at GTC's Santa Monica facility in Winters' office. The subject matter concerned the size of Respondent's cable splicing crew. According to Powers, Winters and Hart informed him that it was necessary to reduce the size of the crew by two cable splicers inasmuch as "[GTC] had overexpended their budget for the year, and that they had evaluated the performance of all contractors in the yard, and two of our splicers were at the bottom of the list." Subsequently, the size of the crew was reduced by laying off the two apprentices, who happened to be the lowest rated splicers.

On July 2, Powers, George White, Respondent's vice president in charge of telephone operations, and John Fischer, Sr., supervisor for telephone communications, held a dinner for the Santa Monica cable splicing crew at the Lobster House restaurant. This was one of a series of meetings, which Powers held with the members of Respondent's cable splicing and cable laying crews in the southern California area, to enable Powers to meet them and possibly dispel rumors regarding Respondent's continued contractual relationship with GTC. After dinner, White spoke to the group, praising their work and assuring them that Respondent's relationship with GTC would continue. While specifically denied by Powers, both Homer McDowell and Gregory Mark Higgins credibly[6] testified that White spoke of possible layoffs elsewhere by GTC but promised that the Santa Monica crew would not be affected. White continued, stating that if any layoffs did occur, they—the Santa Monica crewmembers—would be placed elsewhere with Respondent.

At the conclusion of the speech, White, Powers, and Fischer asked McDowell to step outside so that they could speak privately. According to Powers, "I told Buddy it was going to be necessary that we replace any weaker members of the crew." Powers continued, informing McDowell "that we were having people become available in crews of our own that were reaching the end of their assignment and from the outside . . . and it was going to be necessary to upgrade his crew." McDowell replied "that he really didn't like the idea of replacing anybody on his crew, but he did have some

[2] According to Joseph Powers, who is currently an operations advisor to Respondent but who in 1979 was Respondent's division manager for all California operations, the work ends "when the job is completed" or "if General Telephone is not satisfied with the quality of the workmanship."

[3] As will be developed more fully, the record discloses that McDowell, as the crew foreman, directed the work of the crewmembers, apparently hired employee Higgins, granted time off to employees, rejected potential employees, selected employees for layoff, and could effectively recommend said actions.

[4] The wife of Homer McDowell.

[5] While neither testified regarding this conversation, both Winters and Hart testified as to the performance of Respondent's crew. According to Winters, he was "very definitely" satisfied with the work of Respondent's crew—"It was one of my stronger crews." On the other hand, Hart was significantly less effusive in his praise of the crew, testifying that he rated its work just "average." It should be noted that Hart would have been in the best position to evaluate Respondent's crew inasmuch as he directly coordinated and apportioned the work among the contract crews.

[6] Between Higgins and Powers, I credit the testimony of Higgins, noting that he impressed me as being a truthful and candid witness and that his testimony regarding White's speech was much more detailed and complete than that of Powers. Moreover, I note that Higgins' testimony was corroborative of that of McDowell.

weak splicers, and he indicated those splicers were . . . Flores . . . Hammers, and . . . Horton." According to McDowell, the extent of the conversation merely concerned Powers informing him that he would have to lay off two men and replace them with others coming from the East Coast.[7] Because of his friendship with the cable splicers on his crew, immediately after this conversation McDowell reported the substance of it to the assembled employees. McDowell testified that the men were unhappy, greeted the news with disbelief, and expressed obvious concern over their job security. Higgins testified that McDowell told the crew that "people would be sent in to replace people in our crew," and that the news caused him to be "quite concerned" about his job security.

Two events which occurred on July 9 and 16, respectively, further exacerbated the fears of the Santa Monica crew members regarding their job security and also are illustrative of the extent to which McDowell attempted to protect them. Thus, on July 6, following through on his conversation with McDowell 4 days earlier, Powers sent an apparently well-qualified cable splicer, Ron Pointer, to Santa Monica and instructed him to report to McDowell and tell the latter that Pointer was to replace McDowell's weakest employee. Pointer reported on July 9; however, according to McDowell, after he discovered that Pointer supposedly not only could not read blueprints but also was unable to operate necessary equipment, McDowell refused to hire him.[8] One week later on July 16, Powers sent another well-qualified cable splicer, O'Dell Griffiths, to GTC's Santa Monica facility for placement into Respondent's splicing crew. To ensure no repeat of the previous week's episode with Pointer, Powers sent with Griffiths Francis Simmons, who had been the foreman of Respondent's Newbury Park, California, cable splicing crew, and instructed him to accomplish the replacement himself. Accordingly, when they arrived, Simmons told employee Hui Jon Kim that Griffiths was to be his replacement. However, Kim complained to McDowell when the latter arrived for work, and McDowell refused to permit Griffiths to work, sending the latter and Simmons back to Upland. There is no evidence that Respondent reprimanded McDowell for his conduct on these occasions but the record does disclose that both Hart and Winters were upset at McDowell's actions.

Meanwhile, between July 9 and 16 Arnold Winters informed Respondent that its already reduced Santa Monica cable splicing crew would have to be further decreased by two persons. Winters testified that budgetary considerations mandated another cutback and that the other contract splicing crews were to be equally affected. Winters also informed Respondent that the reductions should be implemented by July 20; however, McDowell complained to him that he was under pressure from Powers to lay off individuals different from whom he wanted. According to Winters, "So rather than get in the middle of an internal problem I told Buddy that I am going to call [Respondent] and have a meeting with them, get an understanding of what direction we were going in with regard to manpower, so I would get [Respondent's] side of the problem."

Therefore, on July 16 Winters telephoned Powers and made an appointment for July 18 at the former's Santa Monica office. Powers testified that this phone call also related to the Griffiths problem that day. According to Powers, Winters asked for a meeting on July 18 "to resolve these difficulties with this crew once and for all." Winters further said that "he was getting feedback from . . . McDowell that we were sending in unqualified people . . . and he wanted to resolve it . . . so that they could continue on with their day-to-day operation." After this telephone conversation and anticipating the worst at the July 18 meeting, Powers became upset "with the fact that our situation in Santa Monica . . . was on shaky ground. I was very concerned about that. We were very close to losing that crew in total."

While Winters was arranging the July 18 meeting with Powers, the Santa Monica cable splicing crew employees were becoming more and more agitated over their perceived insecure job security. Thus, each crewmember was aware of McDowell's conversation with Powers on July 2 and the attempts to replace at least two of them with Pointer and Griffiths. Moreover, the record discloses that McDowell "told all the people that there would be a meeting" on July 18 and that the entire crew thereafter became "afraid that some of them were going to get laid off." Accordingly, throughout the week of July 9 crewmembers met and discussed their job security concerns whenever they had the opportunity. Also, on July 16, apparently acting on her own initiative, at approximately 9 a.m., Rhonda McDowell telephoned Respondent's vice president, White, at his office in Florida. She told him that cable splicers had been sent to replace present crewmembers. White said he did not know the facts but that, if layoffs were necessary, the only fair thing was to keep the most senior people. McDowell replied that the replacements were not Respondent's employees, and White replied that he would investigate. Later that day, Rhonda drafted and sent to White a telegram, confirming their conversation and reiterating the concerns of the Santa Monica employees. Also on July 16 at approximately 4:30 p.m., according to employee Higgins, a meeting of all the crewmembers was held at GTC's Santa Monica yard. The purpose of the meeting was to discuss their options and what actions they could undertake to obtain job security. Among the available

[7] Wherever Powers and Homer McDowell specifically conflict in their testimony, I credit that of Powers, noting that McDowell did not impress me as being a candid witness and he exhibited an obvious bias toward his crew members. As to the testimony of Powers, while I have specifically discredited portions of his testimony when in conflict with what I perceived to be more credible testimony, much of his testimony was uncontroverted and credible. The crediting of portions of his testimony is required under the circumstances of the case and does not require rejection of his entire testimony. *Carolina Canners, Inc.*, 213 NLRB 37 (1974). "Nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Company*, 187 NLRB 3, 4 (1970), enfd. 437 F.2d 502 (5th Cir. 1971).

[8] With regard to McDowell's authority in this regard, Powers admitted that crew foremen do have authority to refuse to hire individuals. However, in Powers' view, McDowell exceeded his authority in this instance inasmuch as he told McDowell in May that the crew had to be upgraded and on July 2 that new people would be sent out. "Under those conditions, I would say [he] would not have the right just to refuse the man without contacting us."

options discussed were seeking advice from an attorney, speaking to the NLRB, and joining a labor union.

With the exception of Higgins, the employees met again before work on July 17 and decided that each would ask Homer McDowell for the next day off to permit them to pursue the options which were discussed the previous afternoon. That evening at approximately 8 p.m., Lawrence Kiggins and David Hammers, who shared an apartment, telephoned Homer McDowell. Kiggins spoke for both and asked McDowell for the next day off. The latter asked why, and Kiggins explained that they had personal reasons. Asked for a further explanation, Kiggins stated that they were going to the Communications Workers of America (CWA) because "they were afraid that they were going to get fired." McDowell then gave his permission. Approximately 15 minutes later, Homer McDowell overheard his wife speaking on the telephone, saying "tomorrow we will take off, then." She then handed the telephone to Homer and said that Gregory Higgins wanted to speak to him. Homer took the receiver, greeted Higgins, and the latter said that they were going to have to take the next day off. McDowell asked why, and Higgins replied, "We have some union matters to take care of." McDowell assented and the conversation ended.

After his wife also requested the next day off and he consented, McDowell told Rhonda that she and the others were premature inasmuch as the meeting the next day could resolve things, and Winters would get Powers off their backs. Rhonda then told Homer that the employees had held a meeting earlier that day and had decided that they wanted the next day off. Homer asked if there would be more telephone calls, and Rhonda reported that the others would ask him for time off the next morning. However, despite this advance knowledge, Homer made no effort to contact any management officials of either Respondent or GTC to warn them of the next day's events. According to McDowell, he was aware that he would be fired but believed he was doing the correct thing.[9]

As he had been forewarned, when McDowell arrived at the GTC Santa Monica yard the next morning, July 18, the remainder of the splicing crew were standing together, waiting for him. As he parked, the employees crowded around his car; McDowell thereupon spoke to each one separately. Horton asked for the day off so that he could visit the NLRB, the Equal Employment Opportunity Commission (EEOC), and the CWA; Flores wanted time off to go to the CWA; Brothers requested the day off to visit the NLRB and the EEOC; and Kim, who evidently speaks limited English, requested time off to go along with the others. As he had done the previous evening after questioning each as to his reason, McDowell individually gave his consent to the employees to be off work that day. Thus, a few moments after he arrived at work that morning, as a result of his own actions as the crew foreman, McDowell had no employees present to work.[10]

Immediately after the crew departed, McDowell "went into the cable yard and I walked up to [Ken] . . . Hart and I told him I had given the men off, and I would like to see . . . Winters." Hart testified that McDowell reported to him that he did not have a crew and, consequently, did not know what he was going to do. Hart asked where the crew was, and McDowell replied that they were seeing an attorney. At this point, Hart and McDowell went to see Winters in the latter's office. According to McDowell, he told Winters that he gave his crew members the day off. Winters asked why, and McDowell replied, "I said most of them are going to the NLRB, they have some labor problems." Winters replied, "Oh shit. This is all Joe Powers needs to fire you." Winters then asked what McDowell was going to do without a crew, and he replied that he would work on blueprints in the office. Winters testified to a different version of this conversation. McDowell, according to Winters, entered the office and announced that he had a problem—his crew was not there. Winters asked him to explain, and McDowell replied that he gave his crew the day off because they wanted to see a lawyer and a union. Winters replied that McDowell had no authority to grant the entire crew time off—just one or two at a time—and that it was a stupid thing to do. Winters continued, stating that he had a meeting scheduled that morning with Powers and that McDowell should have waited until after the meeting. Hart, for the most part, corroborated the version of Winters, testifying that McDowell said that he granted the crew the day off to see an attorney. Winters replied that McDowell should have contacted him first in such a situation. McDowell replied that he did not need to do so, but both Hart and Winters retorted that McDowell should have checked first with them inasmuch as Respondent was a subcontractor hired to do a job and, if it could not be done, GTC should have been informed. The versions of Winters and Hart appear more logical in the context of the event and are credited.

After speaking to Winters, McDowell decided that he finally ought to notify Respondent of his actions. Thereupon, he telephoned the Upland headquarters and asked first to speak to Fischer Sr. and then to Powers. He was told by a receptionist that both were on their way to

[9] Homer McDowell denied advance knowledge of the employees' intentions prior to the night of July 17. While I believe he generally supported their conduct, there is no record evidence to dispute McDowell's contention.

[10] McDowell's authority to grant his entire crew the day off is a central issue in this case. Preliminarily, there is no dispute that, as crew foreman, McDowell did have the authority to grant individual employees time off. Thus, not only did McDowell testify that he possessed such authority, but employee Higgins also testified that McDowell was the individual to whom employees made time-off requests and he was the one who granted said requests. Equally clear is the fact that McDowell possessed no actual authority to grant the entire crew time off at the same time. Thus, Arnold Winters credibly testified, "[W]e only give time off for certain conditions—illness, death, and personal business. And it would be very strange if the whole crew is sick the same day . . . and it would not be [the supervisor's] authority to give the whole crew the day off." Echoing this, Joseph Powers admitted that the crew foreman has authority to grant individual days off but denied that said foreman has authority to give his entire crew a day off. On this latter point, McDowell asserted that he once authorized his entire crew to be off work during the Christmas holidays but later admitted having first checked with GTC and Respondent.

Santa Monica for the meeting with Winters, and he was then connected to John Fischer, Jr., the truck and tool manager. McDowell reported that he gave his crew the day off, and the conversation ended. Fischer Jr. corroborated the conversation but denied contacting his father or Powers about it. There is no record evidence that, prior to their meeting with Winters and Hart, either Fischer Sr. or Powers was aware of McDowell's actions.

Meanwhile, after the remainder of the crew received permission from McDowell to be off work that day, the entire crew—Rhonda McDowell, Higgins, Kiggins, Flores, Horton, Hammers, Kim, and Brothers—met at approximately 8 a.m. at Norm's Restaurant in Santa Monica. Basically, they established a "checklist" of things to do that day. Thus, they concluded that some should go to the EEOC and that Kiggins, Hammers, and Higgins would go to the NLRB. Accordingly, at 10 a.m. the latter three arrived at the offices of Region 31 and spoke to the information officer. They discussed "our problem"—joining a union or becoming represented and information regarding the filing of a grievance or a complaint. After speaking to the information officer, Kiggins telephoned the CWA, and then the three employees left the Regional Office to meet the remainder of the crew at the EEOC office. Subsequently, after discussing what they had learned, the eight crew members returned to Region 31 and jointly filed a representation petition in Case 31-RC-4563, naming as the petitioner Cable Splicers Union of California, and Respondent as the employer.[11]

At approximately the same time as Higgins, Kiggins, and Hammers were speaking to the Region 31 information officer, Respondent's officials, Powers and Fischer Sr. arrived at GTC's Santa Monica offices and learned for the first time that the cable splicing crew was not working. Thus, Ken Hart testified that Powers and Fischer arrived for the scheduled meeting at 10 a.m. and waiting for them were Hart, Winters, Harvey Beigs, GTC's Santa Monica construction administrator, and Marti Schmidt, GTC's contract coordinator.[12] After greeting one another, according to Hart, Winters told Powers and Fischer that the cable splicing crew was not on the job that day, for McDowell had allowed them to take the day off and to see an attorney "because they were unhappy with their working conditions."[13] Powers and Fischer both expressed surprise, said they were unaware of what had happened, apologized for the crew's absence, and said they would investigate immediately. Winters and Hart both responded that they expected the problem to be solved and that they were unhappy with the conduct of the crew and their supervisor McDowell. Powers reiterated that he understood GTC's annoyance, sympathized with the latter's need to have the work done, and assured Winters that the problem would be solved. Beigs then asked what Respondent was going to do to resolve the problems created by the crew's absence. According to Hart, "Joe Powers told us that he had people available, and that he would replace the crew." Then, Powers suggested several individuals who had worked at other locations; however, Hart testified, "We told them that we didn't have any problem with . . . any of their crew. We were just dissatisfied with the action they had taken." Finally, Hart did not recall whether the NLRB, the EEOC, or any union was mentioned as a reason for the crew's absence but specifically denied that either he or Winters requested that the crew be replaced.

Arnold Winters testified that, when Powers arrived, he greeted the latter with the news that he did not have a crew that morning. Powers asked him to explain, and Winters stated that "Buddy came in and told me that the crew went to see a lawyer, and I think . . . something about went to see a union for representation." Winters then told Powers that GTC needed this matter resolved, it needed people to do the work, and it could not tolerate Respondent not having a crew. "So I asked him, what will happen to this crew? He said they will be replaced. And I said, what will happen to Buddy McDowell? And he said, he will be replaced." According to Winters, Powers advised them that a replacement crew would be sent from Lancaster, and the meeting amicably ended at 11:30 a.m.

During cross-examination, Winters reiterated his direct examination, stating, "I am positive that I told Powers that the crew went to see a lawyer and that the crew went to see a union." However, upon being confronted with his retrial affidavit statement, "I may have mentioned their going out to talk—to talk to a union and the NLRB but I am not sure." Winters admitted that now "I am less sure because the time between the time we had the meeting and now." Further, Winters stated that his emphasis throughout the conversation was that GTC needed to have a splicing crew on the job—he placed no emphasis on the reason for the crew's absence. Finally, Winters emphasized that nothing was said regarding past problems with Respondent's crew or the quality of its work.

Joseph Powers testified on behalf of Respondent regarding this meeting. According to Powers, the first person he and Fischer encountered when they arrived at GTC's offices was Winters who said, "'Joe, do you know that your crew is not working today?' I said, 'You are kidding me. I didn't know that.'" After Fischer also expressed surprise, Powers asked whether Winters was serious. The latter replied, "Yes, they are not working today. I believe they have gone to see an attorney."[14] At that point, Winters asked Hart and Harvey Beigs to come into his office and, after cordial greetings, Winters repeated for Beigs that Respondent's crew had been given the day off to see an attorney. Beigs then "ex-

[11] The petition was received by Respondent on or about July 23, 1979.

[12] Powers testified that he telephoned Schmidt on July 16 after he spoke to Winters. After he reported on what had occurred that day in Santa Monica, according to Powers, Schmidt asked for his reaction if GTC wanted the entire Santa Monica crew replaced. Powers responded that such would be no problem inasmuch as Respondent had other qualified people available.

[13] Under my questioning, Hart adhered to his prior testimony that McDowell did not state the crew's purpose for going to see a lawyer. However, Hart credibly testified that he and Winters were aware of the personnel problems on McDowell's crew and that his statement to Powers combined his personal knowledge with what McDowell told them.

[14] Powers denied that Winters said the crew had gone to see an attorney about working conditions.

pressed his displeasure with the situation," and Winters and Hart complained that GTC was unable to meet its workload without the subcontracting crews being ready to work. Powers testified that Beigs finally said, "'Joe, we cannot meet our commitments. We can't allow this to happen. You have assured us that you are going to give us the best crew available. What are you going to do about it?' And at that time I told him that I would replace that crew." After that, the parties discussed what replacement splicers Respondent would provide. Powers stated that the new foreman would be O'Dell Griffiths and that the crew would consist of individuals who would be provided from Respondent's Lancaster, California, crew, whose contract was to be terminated on July 20. It was also the contract of the two idle splicers who, because of their skill, remained on Respondent's payroll but who were not then working.[15] According to Powers, the meeting ended at 11:15 a.m.

The only real dispute regarding this meeting concerns what was said to Powers by either Hart or Winters regarding the reason for the cable splicing crew's absence. Between Powers and Hart, I credit Ken Hart's testimony in this regard. Not only did I find him to be honest and candid but also I note that Hart was a neutral and disinterested witness at the hearing. While he enjoyed the same status, I do not rely on the testimony of Arnold Winters, whose memory about what was said at the meeting seemingly became more and more clouded as his testimony continued.

Homer McDowell, who asserted that he was working on blueprints during the pendency of the aforementioned meeting, testified that the meeting ended at 11:30 a.m. and that John Fischer, Sr., left the meeting and walked directly over to him. After exchanging greetings, according to McDowell, he said to Fischer, "I just got a call from Rhonda and they told me that they just formed themselves a union." Fischer asked for the name and McDowell told him. Fischer then responded, "Well, Burnup & Sims is a nonunion contractor," and walked away. While Fischer did not testify on behalf of Respondent, I doubt the veracity of McDowell regarding this conversation. Thus, the timing of the alleged telephone conversation between Homer and Rhonda McDowell is significant. The former claimed that it occurred at 11:30 a.m.—moments before his conversation with Fischer. However, notwithstanding a leading question by counsel for the General Counsel, Rhonda placed her call to Homer at approximately 12 noon. Further contradicting Homer is the testimony of Higgins who stated that the telephone call was made at 12:30 p.m. and who recalled that specific time because Rhonda reported to him that Powers' meeting with Winters had *previously* recessed for lunch. Accordingly, I do not believe this conversation could have occurred when placed by Homer McDowell and I do not credit his testimony regarding Fischer Sr.

Powers testified that he returned to the GTC offices after lunch at approximately 1:30 p.m. and that, after briefly speaking to Beigs, he spoke to McDowell with Fischer Sr. present. According to Powers, they walked into the yard and Powers told McDowell that he and his entire crew had been replaced. Hart said, "Joe, you can't do that. We are going to form a union." Powers repeated that he had just replaced McDowell and the crew, and, after some brief comments, McDowell gave Powers his badge and left the yard. McDowell related a shorter version of this conversation, stating that he, Powers, and Fischer spoke in the yard and that Powers merely said, "Well, we are going to let you and your whole crew go." For reasons set forth above, I credit Powers as to this conversation.

There is no record evidence that any of the Santa Monica cable splicing crew employees was aware of Respondent's actions of the previous day, and all reported for work on the morning of July 19. None of the replacements had yet arrived, and Fischer Sr. was present to speak to each crewmember as he or she reported for work. According to Rhonda McDowell, Fischer told her that he had her final paycheck, asked for her identification badge, and requested that she unload any GTC equipment from her truck. Rhonda asked if she were being fired, and Fischer replied that he was not firing her. She then asked if she was being laid off, and Fischer replied, "I don't know—I have been told simply to give you your paycheck and get your I.D. badge and tell you to get off the property." After Fischer again refused to specify whether or not she had been fired, Rhonda asked why she had to leave the property. Fischer responded, "Because of yesterday." Higgins corroborated the testimony of McDowell, stating that he was standing next to employee Travis Horton when the latter asked Fischer why he was being laid off. Fischer responded, "Because of yesterday."[16]

According to Respondent's then division manager, Powers, he made the decision to "replace" the Santa Monica crewmembers during his meeting with GTC representatives on July 18 inasmuch as their absence "was the straw that broke the camel's back." Explaining, Powers testified, "We had been encountering numerous difficulties in our operations with [GTC], and they had been indicating to me displeasure with our overall performance, to the extent that our contract was in severe jeopardy with them." According to Powers, he assumed his position in April, and between that date and July, the number of Respondent's employees who were working on cable splicing crews for GTC had substantially decreased. Thus, in April Respondent, Volt Technical Corporation, and CID Communications all had splicing crews working for GTC in and around Indio, California. While the complements of the other crews were not reduced, by July the size of Respondent's crew had been decreased to four splicers and a supervisor from 6 splicers and a supervisor. Likewise, in April, Respondent had cable splicing crews working for GTC in Perris, San

[15] The Lancaster, California, crew cable splicers were Don Nelson and Steve Kowatowski. The other cable splicers discussed were Eugene Melton, Bob McCummins, Eugene Wurzbacher, and James Raines.

[16] The "replacement" supervisor and the "replacement" crew did not report for work until later on July 19. Apparently, rather than Griffiths, the crew foreman was Francis Simmons. Further, Powers admitted that, inasmuch as the crew was not familiar with the Santa Monica territory and work, Respondent did not charge GTC for the first few days of the new crew's work.

Bernardino, Irwindale, Lancaster, Newbury Park, and, of course, Santa Monica, California, and the complements of all these crews were also reduced. Thus, according to Powers, between April and July, the Perris crew was reduced from 11 to 10 splicers and a foreman; the San Bernardino crew was reduced from 8 to 6 splicers and a foreman; the Irwindale crew was reduced from 8 to 6 splicers and a foreman;[17] the Lancaster crew was cut from 8 splicers to 4 and a foreman;[18] and the Newbury Park crew was reduced to 6 splicers and a foreman from its April 12 employee complement. Powers testified that the reduction in size of these crews was caused by "poor performance by the contractor; not providing the people that he was under contract to provide and the quality of their workmanship."

As corroboration for the accuracy of his assessment, Powers testified regarding a series of meetings which he had with GTC representatives during which Respondent's performance was discussed.[19] Thus, on May 2, he had a conversation with Marti Schmidt in her office. The latter "indicated to me that there were problems with the Newbury Park line crew and with Burnup & Sims filling the singles orders." On May 15, Powers spoke again with Schmidt "on the needs of General Telephone Company for Burnup & Sims fulfilling their obligations on the singles contract and our overall bad job." According to Powers, Schmidt "was not happy with our performance." On May 29, Powers met with Schmidt and her superior, John Matson, in Schmidt's office. Both told him "that no matter what I might be hearing from some of [GTC's] people . . . that we had problems . . . because she was getting recurrent complaints from them that they were not giving me and she specifically mentioned . . . Lancaster, Santa Monica, Newbury Park." On May 30, Powers and Respondent's vice president, White, spoke with Schmidt over lunch, and the letter remarked that she was aware of the efforts that Powers had been making "but they hadn't seen any results as yet. They still had the same problems." Finally, Powers testified that, in a June 27 conversation with Schmidt, the latter first announced that GTC was going to terminate Respondent's Lancaster crew, and that they then completely reviewed Respondent's performance in all aspects. Powers testified that Schmidt said, "Generally speaking, Joe, you have a very bad reputation," and "because of the problems . . . if any crews were going to be reduced in [GTC's northern areas], it would be ours."

Specifically regarding the actions taken against the Santa Monica splicing crewmembers on July 18 and 19, Powers maintained that each was merely "replaced" and not "discharged," as alleged in the complaint. Explaining what he meant, Powers averred that "in this business, the workload varies from company to company, locale to locale, and it is just not done. . . . we had anticipated at a point in time these people coming back." As support for his position, Powers testified that, in addition to the aforementioned job offers to Kiggins and Kim, Rhonda McDowell was offered her former job in Santa Monica on August 1 and started work on August 3; that Travis Horton was offered a cable splicing job in Lancaster, California, on July 25 and began work on July 27;[20] and on August 3, employees Higgins, Flores, Brothers, and Hammers were offered cable splicing work for GTC in Redlands, California.[21] According to Powers, these latter offers were made by telegram; Hammers refused the offer; and Respondent received no response from the others.[22] Finally, while maintaining that these employees were not discharged, Respondent does not contend that any remained on its payroll from after July 18 until such time as an offer of reemployment was accepted. In these circumstances, Respondent offered no explanation as to why the Santa Monica employees were treated differently from employees Wurzbacher and Raines, who were retained on its payroll after their work on a Newbury Park, California, cable splicing crew ended in mid-July.

On July 20, Joseph Powers sent identical letters to each member of the "replaced" Santa Monica cable splicing crew. Said letter reads in pertinent part:

> I want to take this opportunity to thank you for the work you have performed for [Respondent] as part of the Santa Monica cable splicing crew.
>
> This has been a particularly difficult period of time for us in Southern California. Much of our work with [GTC] has been curtailed and we have had to struggle to maintain our existing business. *In this atmosphere I regretted having to permanently replace you this past Wednesday.*
>
> While availability of future jobs cannot be assured, I am hopeful that job openings with [Respondent] will arise for which you will qualify . . . . [Emphasis supplied.]

[17] Powers testified that, in August, he was told by GTC officials that the Irwindale cutback was due to budget problems; however, a Volt crew was kept by GTC with no manpower reduction. On August 6, Powers was notified that this crew was being transferred to Redlands, California.

[18] After being abruptly terminated, Respondent's crew at this location was restored on July 20. Also, Powers testified that Volt had a crew continuously working at this location—with no reduction in size. As a result of the restoration, employees Nelson and Kowatowski were kept on this crew and on July 20 splicers Kiggins and Kim were offered, by Respondent, reemployment at Santa Monica in their former positions at the same rates of pay—said employment to commence on July 23. Both accepted.

[19] Powers testified that, prior to working for Respondent, he was employed by Volt Technical Corporation and that, even then, he was aware of GTC's satisfaction with Respondent. According to Powers, in February Volt was asked by Marti Schmidt to establish a cable splicing crew in Santa Monica because "General Telephone Co. was not totally satisfied with the performance of [Respondent's] crew." Also, later that month, Winters told him "that he was not happy and he had problems with Burnup & Sims."

[20] Said work was identical to his work in Santa Monica and at the same rate of pay.

[21] Said work was to be identical to their Santa Monica jobs at the same rates of pay.

[22] Employee Higgins testified that he never received any job offers from Respondent. The record establishes that he lives at 6150 Canterbury Drive, Culver City, California; that he has resided at this same address since January; and that he has a telephone, the number of which is presumably listed in the Culver City, California, directory. However, the record also establishes that, on his employment application form, Higgins wrote his address as 6050 Canterbury Drive, Culver City, California; that he never realized the mistake and, hence, never corrected it; and that on his application, he stated "none" next to "telephone number." All Communications to Higgins by Respondent have been addressed to 6050 Canterbury Drive.

Finally, after they were "replaced," on July 19, employees Hammers, Rhonda McDowell, Higgins, and Flores filed claims for unemployment compensation. For each, Powers completed an unemployment insurance claim form and, in the space marked "If this person quit or was fired, explain in detail," wrote: "Worker was engaged in a strike and was replaced. Burnup & Sims contests this claim." Asked to explain his position, Powers testified, "I honestly did not know what they were doing that day. When I received those documents [the petition in Case 31-RC-4563 and the original charge herein], I presumed they were engaged in a strike."

B. *Analysis*

Counsel for the General Counsel argues that the activities of the members of Respondent's Santa Monica cable splicing crew on July 18 constituted protected concerted activities within the meaning of the Act; that when Respondent's division manager, Powers, became aware of said activities, his immediate reaction was to discharge the cable splicers for having engaged in their protected concerted activities; and that any subsequent job offers to the crewmembers were spurious and intended to mask Respondent's true motivation. In the alternative, counsel for the General Counsel argues that, without regard to the issue of Respondent's bad faith, its actions were unlawful inasmuch as they interfered with the employees' Section 7 rights. In either case, it is alleged that Respondent's conduct was violative of Section 8(a)(1) of the Act. Counsel for Respondent, on the other hand, asserts that Division Manager Powers made a business judgment on July 18 to "replace" the existing Santa Monica cable splicing crew with other available employees; that it is not the task of the Board to evaluate said decision in terms of its reasonableness; and that unless the real motivating purpose is to do that which Section 8(a) forbids, management can act for good or bad cause or no cause at all. More specifically, counsel argues that there is no evidence to establish that Powers was aware of the employees' concerted activities prior to reaching his decision to replace the existing crew; that Powers was not unlawfully motivated in so deciding; and that, in any event, Powers' conduct was not inherently destructive of the employees' statutory rights.

The core questions herein concern Homer McDowell's authority to grant time off to the entire cable splicing crew at the same time and whether he bound Respondent by his actions on July 17 and 18; the nature of the Santa Monica crew's activities on July 18; and whether Respondent was justified in "replacing" the crewmembers for not working on that date. Initially, it is uncontroverted—and credited—that on July 17 and 18 each member of the Santa Monica crew individually received permission from McDowell to be off from work on July 18. Furthermore, notwithstanding McDowell's motivation in granting such permission, which, in any event, I do not deem as consequential to my decision herein, there is no record evidence to establish that these grants were a sham or in the nature of one thief seeking permission from another thief to steal. Indeed, the record establishes that, prior to granting permission to employees Kiggins and Hammers to be absent from work on July 18, McDowell sought an explanation from Kiggins as to their exact reason and that he attempted to dissuade his wife from requesting time off by reminding her that the employees' concerns might conceivably be alleviated as a result of the Powers-Winters meeting the next day. The fact that the employees sought and obtained permission from McDowell to be absent from work on July 18 is a significant factor in determining the legality of Respondent's job action against its employees for not being at work on July 8. *Supreme Optical Company, Inc.*, 235 NLRB 1432, 1433, fn. 9 (1978).

Central to a determination of McDowell's authority to grant his entire crew a day off and whether he, therefore, bound Respondent by said conduct is the matter of his supervisory status. The record reveals that in his capacity as crew foreman, McDowell independently hired employee Higgins; apparently he was expected by Powers to independently choose employees for replacement on July 9 and 16; he could reject potential hires; he could effectively recommend personnel actions; and he independently directed the work of the Santa Monica crew. In these circumstances, McDowell clearly was a supervisor within the meaning of Section 2(11) of the Act. *Warren Rural Electric Cooperative Company, Inc.*, 209 NLRB 325 (1974). Further, Respondent does not contest that, as part of his authority, McDowell also was empowered to grant employees time off from work. In this regard, the record establishes that Supervisor McDowell was the management representative to whom his crewmembers submitted requests for time off, that he decided whether to grant said requests without consulting with either Respondent or GTC management officials, and that employees had no reason to suspect or believe that McDowell possessed no authority to do so. However, the record also establishes that McDowell's authority in this regard did not extend to granting time off to the entire crew at the same time unless he received authorization to so do and that he understood this limitation. Respondent further argues that the Santa Monica crewmembers knew—or should have known—this limitation on McDowell's authority, but there is just no record evidence to justify such a conclusion.

It is gainsaid that, under the Act, an employer's supervisors are also its agents. *Laborers' International Union of North America, AFL-CIO Local 478 (International Builders of Florida, Inc.)*, 204 NLRB 357 (1973). While conceding McDowell's status as an agent, Respondent nevertheless argues that, inasmuch as McDowell possessed no actual authority independently to permit his entire crew to be absent from work on July 18, he could not have bound Respondent by his conduct which clearly exceeded the scope of his authority. However, I do not believe that the extent or specificity of an agent's authority is the focus of the Board's traditional inquiry into such questions. Rather, careful analysis of prior decisions reveals that the Board seeks to determine whether the agent's actions were within the scope of his general authority and, if so, his conduct will be found to be binding upon the employer. Thus, in *International Longshoremen's and Warehousemen's Union, C.I.O. (Sunset Line and Twine Company)*, 79 NLRB 1487, 1507-9 (1948), the

Board stated: "A principal may be responsible for the act of his agent [within the scope of the agent's general authority] . . . even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted." Analysis of this quotation, the facts of the case in which it appears, and subsequent Board Decisions involving similar issues reveals that the Board, by the aforementioned language, merely adopted the traditional common law principle of "general agency." Thus, Restatement defines a general agent as one "authorized to conduct a series of transactions involving a continuity of service" and states that, when acting in said capacity, the general agent subjects his principal for liability for *all* conduct—authorized and unauthorized. This latter principal is premised upon the rationale that the general agent is very much a part of the principal's business organization and is "continually dealing solely with the employer's business." Restatement of Agency 2d §553 and 161 (1958). The aforementioned sections of Restatement give as examples of general agents managers of business, salesclerks, and any person of that type. In *Sunset Line and Twine Company, supra* (union officer); *Hampton Merchants Association, etc.*, 151 NLRB 1307 (1965) (union business agent); *LTV Electro Systems, Inc.*, 169 NLRB 532 (1968) (personnel department interviewer); and *Broad Street Hospital and Medical Center*, 182 NLRB 302 (1970) (hospital administrator), the Board concluded that said individuals bound their respective employers for conduct arguably outside the scope of their authority and not specifically authorized. Although unstated by the Board, I believe the common characteristics linking these decisions are the agent's continuity of service and the fact that each agent acted within the broad guidelines of his general authority. Likewise, these factors are present herein. Thus, as a crew foreman and, therefore, Respondent's only representative at a particular location, McDowell obviously was an integral part of Respondent's operations. Moreover, inasmuch as he specifically was authorized to grant time off and was the managerial representative to whom employees turned when seeking time off, McDowell clearly acted within the scope of his general authority in permitting the entire splicing crew to be off work on July 18. Accordingly, notwithstanding the lack of specific authorization, I believe that Respondent was bound by the actions of its supervisor, Homer McDowell, on July 17 and 18. *Glenroy Construction Co., Inc.*, 215 NLRB 866, 867 (1974); *GAC Properties, Inc.*, 205 NLRB 1150 (1973); *Sunset Line and Twine Company, supra.*[23]

Counsel for the General Counsel argues that the activities of the Santa Monica crewmembers on July 18 constituted protected concerted activities within the meaning of the Act. The record reveals that, on that morning, the crew divided into two groups, with three employees meeting with representatives of Region 31 of the NLRB and the remainder with officials of the EEOC. Subsequently, the eight crewmembers returned to the NLRB office and filed the representation petition in Case 31-RC-4563. Clear Board precedent establishes that said activities constitute protected concerted activities within the meaning of the Act. *Roadway Express, Inc.*, 239 NLRB 653 (1978); *General Teamsters Local Union No. 523, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Theaters Service Company)*, 237 NLRB 258 (1978); *General Nutrition Center, Inc.*, 221 NLRB 850 (1975). The record further reveals that, during his meeting with GTC representatives on July 18, Powers stated his intention to "replace" the existing members of the crew, that said action was based upon or, at least, precipitated by, the entire crew's absence that morning, and that Powers' decision was carried out the next morning by John Fischer, Sr., who told the employees that they were being given their final checks, "Because of yesterday."

Seizing upon the announcement on July 18 of the Crew's absence and the timing of Powers' subsequent decision to "replace" the entire crew, counsel for the General Counsel argues that Powers' decision was obviously motivated by the protected concerted activities in which the employees engaged. Contrary to this position, Respondent argues that Powers simply had no knowledge that the employees were engaging in protected activities and, therefore, could not have been motivated by them. Contrary to Respondent, I have previously credited the testimony of Ken Hart that, at the start of the meeting that morning, he informed Powers and Fischer that the cable splicing crew had been given the day off in order to consult an attorney because they were unhappy with their working conditions. Moreover, notwithstanding my aforementioned credibility resolution, I believe that, whatever Hart's comments, Powers interpreted them as meaning that the employees were, in fact, engaged in protected concerted activities—nothing less than strike in protest of a perceived impending layoff. Thus, in contesting the unemployment insurance compensation claims of several of the crewmembers, Powers wrote: "Worker was engaged in a strike and was replaced."[24] Moreover, in his letter to each respective crewmember, dated July 20, Powers stated that the employee was permanently replaced—a position consistent with the rights of an employer *vis-a-vis* an economic striker. Accordingly, I believe that the record clearly justifies the conclusion that, as a result of Hart's comments to him at the start of the July 18 meeting, Powers was aware—or, at least, believed—that his employees were engaging in some form of protected concerted activities that day.

Notwithstanding such knowledge, Respondent asserts that there is no evidence to establish that Powers was unlawfully motivated in deciding to "replace" Respondent's existing Santa Monica crew with other, available cable splicers. Rather, it is argued, Powers was solely concerned with the fact of the crew's absence and that, in view of negative statements made to Powers by GTC

[23] Respondent further argues that McDowell possessed no "apparent authority" to grant time off to the entire crew on July 18. Inasmuch as I believe Respondent was bound by McDowell's actions as stated above, I need not rule on this argument.

[24] I cannot credit Powers' illogical explanation for his comments on the unemployment compensation forms that his conclusion was based on examination of the representation petition. Nothing on said petition would lead to such a conclusion.

officials regarding Respondent's performance and a decline in the size of its southern California cable splicing crews, said absence was "the straw that broke the camel's back." While I recognize the uncontroverted nature of much of Respondent's evidence with regard to the issue of Respondent's contractual difficulties, having carefully considered and researched Board decisions on the matter of motivation, I do not think that the existence of or lack of unlawful animus is a necessary or relevant consideration in an 8(a)(1) discharge case, as herein involved, in which the very conduct for which employees are disciplined is itself protected concerted activity.[25] I have previously concluded that, by consulting with the EEOC and NLRB on July 18, with the permission of their supervisor, McDowell, the members of the Santa Monica cable splicing crew engaged in protected concerted activities. *Roadway Express, supra; General Nutrition Center, supra.* While counsel for Respondent asserts that the fact of the crew's absence was the crucial factor in Powers' decision to "replace" them and not the activities of the crew while absent, I do not believe it analytically valid or legally permissible to separate somehow the crew's absence from their reason for—and activities while—being absent and further believe that Respondent's conduct, therefore, unlawfully intruded upon and interfered with the employees' exercise of the rights guaranteed them under the Act. *Fall River Savings Bank, supra* at fn. 3. Both the Board and the courts have reached similar conclusions in cases involving discipline for engaging in protected acts. Thus, in *Wheeling-Pittsburgh Steel Corporation*, 241 NLRB 1214 (1979), an individual invoked a clause of a collective-bargaining agreement, between his union and his employer and refused to operate equipment which he considered unsafe. The employer disciplined the individual for withholding his services and, thereby, disrupting the workplace. The administrative law judge, in a decision adopted by the Board, concluded that the employer acted in violation of Section 8(a)(1) and (3) and, in language which is particularly pertinent herein, stated: "The fact, as urged by the Respondent, that it acted in the belief that it was justified in disciplining Semancik for withholding his services and thereby causing an interruption of production *is no defense where, as was true in this case, the activity for which Semancik actually was disciplined protected by the Act.*" *Wheeling-Pittsburgh Steel Corporation, supra* at 1222 (emphasis supplied).

The United States Court of Appeals for the Ninth Circuit reached the same result in *Salt River Valley Water Users' Association* v. *N.L.R.B*, 206 F.2d 325, 328-329 (1953). Therein, an employee circulated a petition among the other employees and was disciplined. The Board concluded that the employer violated Section 8(a)(1) of the Act; however, the employer argued to the court that, notwithstanding the protected nature of the activity, the individual was disciplined because of the disturbance which was caused by the activity. The court dismissed the employer's arguments noting that protected concerted activities create a disturbance in the sense that they disrupt the status quo and that, while the employer may have felt justified in acting as it did, such "is not material where the activity for which [the individual was disciplined] . . . was actually protected by the Act."[26]

Upon review of the rationale of *Wheeling-Pittsburg* and *Salt River Valley*, I think that, in order to justify or to excuse Powers' conduct in "replacing" the existing Santa Monica cable splicing crew because of their absence on July 18, it must be shown that the group action itself—as opposed to the effect—constituted misconduct, that the employees knowingly engaged in such misconduct, and that Powers reacted to that misconduct. I do not believe that the record supports such findings. Thus, the paramount considerations herein are that Supervisor McDowell individually gave his permission for each crewmember to be off work that day and that, under existing Board law, Respondent was bound by McDowell's

[25] While I do not believe that the issue of motive is relevant herein, whether such a finding is critical in 8(a)(1) discharge cases is a source of confusion. Thus, in *Fall River Savings Bank*, 247 NLRB 631, fn. 3 (1980), the Board, quoting from an earlier decision, stated, "In adopting the Administrative Law Judge's conclusion [that Respondent violated Section 8(a)(1) of the Act] . . . we do not rely on his comment that Respondent's 'motive in discharging her' was significant in this case. It has long been settled that a violation of Section 8(a)(1) does not turn on the employer's motive, but rather on 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'" Contrast the foregoing with the Board's language in its recent—and landmark—decision in *Wright Line, a Division of Wright Line, Inc.*, 251 1083 (1981). Therein, the Board stated: "In resolving cases involving alleged violations of Section 8(a)(3) *and, in certain instances, Section 8 (a)(1)*, it must be determined . . . whether an employee's employment conditions were adversely affected by his or her engaging in . . . protected activities and, if so, whether the employer's action was motivated by such employee activities." (Emphasis supplied.)

Counsel for Respondent argues that, in order to establish a violation of Sec. 8(a)(1) of the Act herein, the record must demonstrate "that the employer's actions evidenced an *intent* to discriminate." As support, he sets forth lengthy quotations from three Supreme Court decisions—*N.L.R.B.* v. *Brown, et al., d/b/a Brown Food Store, et al.*, 380 U.S. 278 (1965); *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); and *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Initially, I note that each involves a violation of Sec. 8(a)(3) of the Act and that the elements of proof are vastly different. Further, he cites the following language from *Brown Food Stores* as support for his argument that Respondent's conduct may be justified by business considerations: "We recognize that, analagous to the determination of unfair labor practices under Section 8(a)(1), when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage a union membership is necessary to establish a violation of Section 8(a)(3)." *Brown Food Store, supra* at 287. A careful reading of this language establishes that the clause beginning with "when" and ending with "ends" modifies the clause which follows and that, in the quoted limited instance, the Court meant that, as in 8(a)(1) cases, proof of discriminatory intent is not necessary in 8(a)(3) cases.

[26] While I do not believe that the argument that Powers acted in good faith based solely on business considerations is a relevant consideration herein, I also do not believe that the record conclusively supports this assertion. Initially, I note that it is uncontroverted that, throughout the spring of 1979, GTC officials were critical of Respondent's performance and that the latter suffered reductions in the sizes of its southern California cable splicing crews. But, such cannot explain Powers' decision to replace the entire Santa Monica cable splicing crew. Thus, while he understandably was upset upon learning of the crew's absence, Powers was not asked by either Winters, Hart, or Beigs to replace a single crewmember. Further, the crew was absent with the express permission of its supervisor, Homer McDowell. If bad judgment was used, he was the individual at fault. Moreover, as pointed out by counsel for the General Counsel, inasmuch as the crew returned to work the next day, several more days were wasted in training and familiarizing the replacements with the area and the procedures and Respondent chose not to bill GTC for this time. In short, I do not believe that the record establishes that business considerations made Powers' conduct necessary or justifiable.

actions. *Glenroy Construction Co., supra; GAC Properties, Inc., supra; Sunset Line and Twine Company, supra.* Analysis of the reasons submitted to McDowell by the individual employees in requesting the day off reveals that these involved protected activity—consulting a union, the NLRB, or the EEOC. Further, based on McDowell's consent, the employees clearly and reasonably believed that they, indeed, had permission to be off from work. *Morris Railway Supply Corporation*, 191 NLRB 487 (1971). The fact that McDowell may have exercised poor judgment in not consulting with management of either Respondent or GTC does not negate the effect of his actions. *Coastal Care Centers, d/b/a Pacific Convalescent Hospital*, 229 NLRB 507, 513 (1977). In these circumstances, the record does not warrant the inference that the crewmembers collectively engaged in misconduct by implementing their decision not to work on July 18 in order to engage in protected activities. *Supreme Optical Company, Inc.*, 235 NLRB 1432, 1433 (1978).

Next, notwithstanding the foregoing analysis, counsel for Respondent argues that by their actions on July 18, as I have previously concluded Powers believed, the Santa Monica crewmembers engaged in a 1-day strike against Respondent, protesting their working conditions. Asserting this position, counsel logically argues that, while said conduct may have been protected, Respondent acted within its rights by replacing the existing crewmembers—as Powers announced to the GTC representatives that morning. However, it is axiomatic that a strike presupposes the withholding of services. Contrary to Respondent, the record clearly establishes that each Santa Monica cable splicing crewmember requested and obtained permission from Homer McDowell to be off work on July 18. "The essence of a strike is the voluntary concerted withholding of labor requested by an employer. It would therefore be illogical to consider as a striker an employee who had requested and who believed he had obtained permission to absent himself from work. A striker does not seek permission to strike." *Columbia Pictures Corporation*, 82 NLRB 568, 577 (1949). Further, I have previously concluded that Respondent must be found to have been bound by McDowell's actions whether or not he was specifically authorized to permit the entire crew to take the day off and, in this regard, it makes no difference whether McDowell exercised poor judgment in doing so. *Coastal Care Centers, d/b/a Pacific Convalescent Hospital, supra.* While Respondent argues that the crew would, in any event, have refused to work on July 18 if McDowell had denied them permission to be off, such is nothing more than speculation and, as pointed out above, there is no evidence that the requests for permission were a sham. Moreover, if, as I think, Powers mistakenly believed his employees were engaged in a strike on July 18 and "replaced" the existing crew on that basis, his actions nonetheless constitute a violation of Section 8(a)(1) of the Act. *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427 (1978).

Finally, counsel for Respondent argues that Powers never entertained any intention of severing the employment relationship with any crewmember and he always intended to utilize the replaced crewmembers again; that when positions on the replacement Santa Monica crew became available, Powers offered the jobs to former crewmembers Kiggins, Kim, and Rhonda McDowell; and that when other Southern California positions became available, these were offered to the remainder of the replaced crew. While these latter facts are uncontroverted, it is also true that the employment relationship between Respondent and the replaced Santa Monica crewmembers was, in fact, terminated on July 19. Thus, that morning, John Fischer, Sr., spoke to each employee, gave each a "final paycheck," instructed the employees to return any GTC tools or equipment, and demanded that each leave GTC's property. This behavior is in obvious contrast to the behavior of Respondent towards employees Wurzbacher and Raines who, even though not working, were retained on Respondent's payroll after their work on another cable splicing crew ended in mid-July. Finally, the offering of positions to replaced Santa Monica crewmembers is, of course, open to differing interpretations. Thus, it is conceivable, and entirely plausible, that Respondent made said offers in order to limit its potential monetary liability or perhaps to establish its defense herein. Accordingly, standing alone, I do not believe that the later job offers negate the unmistakable evidence that, on July 18 and 19, Respondent meant to—and did—terminate its employment relationship with Gregory Mark Higgins, Rhonda McDowell, David Hammers, Lawrence Kiggins, Travis Horton, Hui Jon Kim, Rodney Brothers, and Jess Flores. Based on the foregoing, and the record as a whole, I find that Respondent violated Section 8(a)(1) of the Act by discharging said individuals on July 19 based on their having engaged in protected activities the previous day. *Salt River Valley, supra; Wheeling-Pittsburgh Steel, supra; Supreme Optical Company, supra; Morrison Railway Supply, supra.*

THE REMEDY

Having concluded that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act, and inasmuch as I have found that Respondent unlawfully terminated employees Higgins, Rhonda McDowell, Hammers, Kiggins, Horton, Kim, Brothers, and Flores on July 19, that the standard—and herein applicable—remedy in such instances is to order Respondent to reinstate each employee to his or her former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges. In addition, Respondent will be ordered to make each employee whole for any loss of earnings he or she may have suffered as a result of Respondent's unfair labor practices by payment to each employee of the amount he or she normally would have earned from July 19, with backpay to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). However, while the utilization of said remedy appears mandated herein, its application has been complicated by several al-

leged offers of reinstatement by Respondent to the discharged employees.

Initially, clear Board law is that a good-faith offer of reinstatement, whether received by the employee or not, tolls the backpay period of the employee. *Marlene Industries Corporation, et al.*, 234 NLRB 285, 287 (1978). However, only when such an offer has been expressly rejected by the employee is the employer relieved of his statutory duty to reinstate. *Leeding Sales Co., Inc.*, 155 NLRB 755 (1965). Herein, it is uncontroverted that Respondent offered to employees Kim and Kiggins on July 20 and to Rhonda McDowell on August 1 reinstatement to their former positions on the Santa Monica cable splicing crew and at the identical rates of pay. Kiggins and Kim, accepted and began working in Santa Monica on July 23; McDowell accepted and began working in Santa Monica on August 3. Accordingly, as to employees Kiggins, Kim, and McDowell, I shall order Respondent to make them whole for any loss of earnings they may have suffered by payment to each of the amount he or she normally would have earned from July 19 until the date he or she was reinstated and in the manner set forth above.

As to employees Horton, Brothers, Hammers, Flores, and Higgins, the record establishes that, on July 25, Respondent offered to Horton a position on its Lancaster, California, cable splicing crew at the same rate of pay which he received in Santa Monica and for performance of identical work; Horton accepted. Likewise, on August 3, Respondent, by telegram, offered to employees Higgins, Flores, Brothers, and Hammers positions on its Redlands, California, cable splicing crew at their Santa Monica wage rates and for the identical type of work. According to Powers, Hammers refused, and Respondent received no response from the others. Counsel for the General Counsel argues that said Redlands, California, offers were spurious, designed to "mask" Respondent's unfair labor practices, and, in any event, were not to substantially equivalent positions as formerly occupied by the crewmembers inasmuch as acceptance would have required the employees to travel great distances and would have caused numerous other inconveniences. On the other hand, Respondent argues that these job offers did constitute valid offers of reinstatement and, thus, would toll its backpay liability and eliminate the need for a reinstatement remedy for these individuals. In support, Respondent offered into evidence a chart, based on its March 1980 employment records, which purportedly shows the distances its cable splicing employees travel from their permanent or temporary residences to their work locations. Questioned as to the purpose of its offer, counsel for Respondent explained that the document illustrated an industrywide practice that cable splicers customarily travel substantial distances to work. The document was received on that basis and with the understanding that it would only be received as pertaining to Respondent's cable splicers.

While the document contains numerous factual errors and Powers admitted not having personally verified much of the information contained therein, the basic premise of the document appears to be valid. Thus, employee David Hammers candidly admitted that, although he did not accept the Redlands, California, offer, it was common in the industry for cable splicers to move to other cities in order to obtain work. Based upon the foregoing, I do not find Respondent's job offers to be spurious; however, I also do not think that the Lancaster and Redlands job offers, in any way, tolled Respondent's backpay liability to Horton, Brothers, Hammers, and Flores or eliminated—or obviated—the necessity for reinstatement offers. Thus, the record establishes that, although filled by others, the Santa Monica cable splicing positions were still in existence when these offers were made.[27] In such circumstances, the Board has traditionally maintained that reinstatement must be to the *former position* "as long as such former position exists" and that, if the former position does *not* exist, then, and only then, is reinstatement permissible to a substantially equivalent position. *Valmac Industries, Inc.*, 229 NLRB 310, fn. 5 (1977); *Jay Company, Inc.*, 103 NLRB 1645, 1647, fn. 7 (1953). Accordingly, while these may have been equivalent positions, it cannot be said that the offers of cable splicing jobs on Respondent's Lancaster and Redlands, California, crews constitute valid offers of reinstatement to their former positions to employees Horton, Hammers, Flores, Brothers, and Higgins so as to toll Respondent's backpay liability or to remove the employees' rights to reinstatement.[28]

Subsequent to these offers, on September 19, Respondent offered to employees Hammers and Flores reinstatement to their former Santa Monica positions at the same rates of pay. Hammers admitted receiving but rejecting the offer. Flores also admitted that he received the offer and rejected it. Accordingly, pursuant to the applicable Board precedent, I find that Respondent's backpay liability as to Hammers and Flores[29] was tolled as of September 19 and that its statutory duty to reinstate said individuals has likewise been relieved.[30]

Finally, as to employee Higgins, the parties stipulated that, on September 19, Respondent mailed to him an offer of reinstatement to his former Santa Monica position at the same rate of pay but that said offer was not received. The parties further stipulated that the document was sent by registered mail, and the record dis-

[27] I note—and it is uncontroverted—that, as of July 20, the Santa Monica crew was reduced by GTC to six cable splicers and a foreman. It is left to the compliance stage to handle the mechanics of reinstatement in such circumstances.

[28] I make no finding, and leave for the compliance stage, as to whether these offers should have been accepted in order for the named employees to satisfy their burden of mitigating Respondent's backpay liability.

[29] As to Flores, Respondent contends that it has never owed backpay to him nor was it under any duty to reinstate him inasmuch as Flores, in any event, was subject to being laid off on or about July 20. Thus, as set forth above, the record establishes that GTC ordered Respondent to reduce its Santa Monica cable splicing crew by an additional two employees by July 20. Further, Flores testified that, sometime during the week of July 9, McDowell told him that Powers wanted him [McDowell] to lay off Flores. There is no other evidence on this point; nor is there conclusive evidence that Flores would, indeed, have been a choice for layoff on July 20. Accordingly, as I have left it to the compliance stage for a determination as to which employees should be reinstated in view of the aforementioned circumstances, it is also left to the compliance proceedings for a determination as to the status of employee Flores.

[30] Counsel for Respondent apparently conceded at the hearing that no offers to their former Santa Monica positions have been made to employees Brothers and Horton.

closes that the letter was addressed to Higgins at 6050 Canterbury #5-311, Culver City, California 90230. As I have discussed above, Higgins' actual address is 6150 Canterbury Drive, Culver City, California; however, the only information in Respondent's records, which information came from Higgins, is that Higgins' address is the one to which the September 19 offer was sent. Further, while Higgins testified that he has a telephone but received no telephonic reinstatement offers from Respondent, the record establishes that Higgins himself stated to Respondent, which information was not updated, that he had no telephone.

As a general rule, "the burden is fully upon the employer to present probative evidence of a good-faith effort to communicate [a valid offer of reinstatement] to the discriminatees." *Lipman Bros., Inc., et al.*, 164 NLRB 850, 853 (1967). In line with this rationale, the Board has held that offers, mailed to an individual's last known address and returned unopened, toll the employer's backpay liability but do not relieve it of the obligation to reinstate. *Rental Uniform Service*, 167 NLRB 190, 198 (1967); *Jay Company, Inc., supra*. In urging that the mailings to Higgins at 6050 Canterbury Drive were made in good faith, Respondent contends, as the record seems to establish, that Higgins should have been aware of his *own* errors but never bothered to update or change his own recorded information on Respondent's records. However, bearing in mind that the burden in such cases is upon Respondent, I believe that the key phrase is "good-faith effort." Thus, the record establishes that Powers' July 20 letter, still in the unopened envelope, to Higgins was returned to Respondent. Even the most cursory examination would have revealed that, rather than being returned because of an incorrect address, the letter was "refused" and that, most significantly, the typed street number was corrected to "6150 Canterbury #5-311." Certainly, I further believe, this should have placed Respondent on notice that Higgins' address, as set forth in its records, was, or may have been, erroneous and should have precipitated an investigation. Moreover, there were available means by which Respondent could have verified Higgins' correct address or ascertained whether he possessed a telephone. Thus, Powers or Respondent's crew foremen could have queried previously reinstated Santa Monica crewmembers regarding Higgins' correct address; Respondent's officials could have personally checked the Los Angeles, California, telephone listings—Higgins possessed a phone and presumably was listed therein; or Powers could merely have examined Higgins' unemployment insurance compensation claim upon which Higgins' correct address appears and upon which Powers himself wrote that Higgins was a striker on July 18. I mention the above not to excuse Higgins' laxity or negligence in realizing his errors *vis-a-vis* Respondent's records but rather to point out that alternatives were available to Respondent for it to have corrected its records. In these circumstances, I believe applicable Board decisions would belie any assertion by Respondent that it acted in "good faith" by continually addressing offers to Higgins at, what it should have known was, a possibly erroneous address. *Marlene Industries Corporation, supra* at 288; *Gladwin Industries, Inc.*, 183 NLRB 280 (1970). Accordingly, I believe that Respondent's backpay liability to Higgins has never been tolled and that it still is under a duty to reinstate him.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By terminating employees Gregory Mark Higgins, Rhonda Carol McDowell, David Lawrence Hammers, Lawrence Robert Kiggins, Travis Lee Horton, Hui Jon Kim, Rodney Brothers, and Jess Flores on July 19, 1979, based on their having consulted with officers of the NLRB and the EEOC, Respondent interfered with, coerced, and restrained its employees in the exercise of rights guaranteed by Section 7 of the Act and, thereby, engaged in unfair labor practices violative of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[31]

The Respondent, Burnup & Sims, Inc., Upland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise interfering with, coercing, or restraining its employees as a result of their having consulted with agents of NLRB and the EEOC or engaged in any other protected concerted activities.

(b) In any like or related manner interfering with, coercing, or restraining its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer to employees Gregory Mark Higgins, Travis Lee Horton, and Rodney Brothers immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed, and make each whole for any loss of benefits suffered by reason of his discharge in the manner described in the Remedy section herein, with interest.

(b) Make Lawrence Robert Kiggins, Hui Jon Kim, Rhonda Carol McDowell, David Lawrence Hammers, and Jess Flores whole for any loss of benefits suffered by reason of the discharge of each in the manner described in the Remedy section herein, with interest.

(c) Post at its Upland, California, office, copies of the attached notice marked "Appendix."[32] Copies of said

[31] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[32] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. In addition, and inasmuch as it does not appear that Respondent's cable splicers ever visit the Upland, California, office on any regular basis, Respondent is also ordered to mail to each of its cable splicers who work for GTC in the southern California area a copy of the aforementioned notice.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.